Index.

Subject Index.

	Page
Statement as to jurisdiction	1
Statutory provisions sustaining jurisdiction	1
State statute the validity of which is involved	1
Date of the judgment sought to be reviewed	3
Statement of matter involved	4
Cases believed to sustain jurisdiction	7
Substantial nature of federal questions	7
Time of raising federal questions	7
Conclusion	14

Table of Cases Cited.

Bennett v. *Nichols*, 9 Ariz. 138, 80 Pac. 392	7
Fayerncather v. *Rich*, 118 Fed. 943, 195 U. S. 276, 49 L. Ed. 193	7
Memphis v. *Cumberland*, 218 U. S. 624, 31 Sup. Ct. 115, 54 L. Ed. 1185	7
Pacific Electric R. R. Co. v. *Los Angeles*, 194 U. S. 112, 24 Sup. Ct. 586, 48 L. Ed. 896	7
Savage v. *Jones*, 225 U. S. 501, 32 Sup. Ct. 715, 56 L. Ed. 1182	7
State v. *Spande*, 37 Minn. 322, 34 N. W. 164	7

Statutes Cited.

Act of Congress of March 3, 1891, 26 Statutes at large 827, Ch. 517, par. 5	1
Arizona Code, 1939, Section 73–841 (Section 55, Chapter 103, Senate Bill No. 116, Session Laws, 1931)	2
Constitution of Arizona:	
Article 2, paragraph 4	3
Article 2, paragraph 13	3
Article 4, paragraph 19, Clauses 5–9–13 and 18	3
Constitution of the United States, 14th Amendment	3
Corpus Juris, Vol. 25, p. 912, Note 7	7
Session Laws of Arizona, 1941, Chapter 54, p. 110, adding Section 27–1404 to the Arizona Code Annotated, 1939	1, 2

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1943

No. 308

COIT I. HUGHES; H. B. HUGHES; J. M. GOODSON; FRANCES LOUNT, S. D. LOUNT; J. D. COLLINS; J. W. RAY; JULIA C. COLLINS; H. L. MOSHER, INDIVIDUALLY AND H. L. MOSHER, AS TRUSTEE,

Petitioners,

vs.

J. L. GUST,

Respondent.

STATEMENT OF JURISDICTION.

Petitioners herein, who were appellants in the Arizona Supreme Court, disclose the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment, or decree, in the above entitled action.

a. The petitioners believe that the United States Statute cited as follows:

> Act of March 3, 1891, 26 Statute at Large 827, Chap. 517, Par. 5 sustains such jurisdiction.

b. The validity, or applicability, to this case of the Chapter 54, Session Laws of Arizona, 1941, Page 110, being a new section:

> No. 27-1404, added to the Arizona Code Annotated 1939, which is in words and figures as follows, to-wit:
>
> "State of Arizona House of Representatives Fifteenth Legislature Regular Session.

CHAPTER 54. HOUSE BILL NO. 77. AN ACT.

Relating to actions to quiet title; amending article 14, chapter 27, Arizona Code of 1939, by adding section 27-1404.

Be it enacted by the Legislature of the State of Arizona:

Section 1. Article 14, chapter 27, Arizona Code of 1939 (Article 8, chapter 93, Revised Code of 1928), is amended by adding section 27-1404.

27-1404. *Jurisdiction of court to enter decree.*

In any action which may be brought to quiet title to real property, if the complaint shall set forth that any person or the State of Arizona has or claims an interest in or lien upon the real property, and that said interest or lien or the remedy for the enforcement thereof is barred by limitation, or that the plaintiff would have a defense by reason of limitation to any action to enforce said interest or lien against said real property, the court shall hear evidence thereon and if it shall be proven that said interest or lien or the remedy for the enforcement thereof is barred by limitation, or that the plaintiff would have a defense by reason of limitation to any action to enforce said interest or lien against said real property, then the court shall have jurisdiction to enter a decree and the plaintiff shall be entitled to have a decree of the court barring and forever estopping the assertion of said interest or lien in or to or upon said real property adverse to the plaintiff.

Approved: March 19, 1941.

SIDNEY P. OSBORN, *Governor.*"

and the—Section 73-841 Arizona Code, Annotated 1939, being—Section 55, Chapter 103, Senate Bill No. 116, of Session Laws of 1931,

which is in words and figures as follows, to-wit:

"Section 55. No person upon whom a tax has been imposed under any law relating to taxation shall be permitted to test the validity thereof, either as plaintiff or defendant, unless such tax shall first have been paid

to the proper county treasurer, together with all penalties thereon. No injunction shall ever issue in any action or proceeding in any court against this state, or against any county, municipality, or officer thereof, to prevent or enjoin the collection of any tax levied. After payment an action may be maintained to recover any tax illegally collected and if the tax due shall be determined to be less than the amount paid, the excess shall be refunded in the manner hereinbefore provided."

The two laws, supra, sustain the jurisdiction of this Court, as well as the respective constructions thereof in the light of and under the requirements of the Constitution of the United States,

Article 14, Amendments, and the Constitution of the State of Arizona,

Article 2, Paragraph 4, Due Process of Law Clause; Article 2, Paragraph 13, Equal Operation of the Laws Clause; and Paragraphs 19, Article 4, Part 2, Clauses 5-9-13 and 18,

respectively forbidding the enactment by the Legislature of the State of Arizona of local or special laws which:

Clause 5—Regulate the practice of Courts of Justice;
Clause 9—Pertaining to Assessment and collection of taxes;
Clause 13—Grant to any * * * Class of Citizens any special, or exclusive, privileges, immunities, or franchises;
Clause 18—Relinquish any indebtedness, liability, or obligation to this state;

are all involved in this case and appellants petition for a review thereof by this Court and allowance of appeal and reversal of the judgment as affirmed by the State Supreme Court.

c. The judgement, or decree, sought to be reviewed is dated April 23, 1942, in the trial court; and it was affirmed by the Supreme Court of Arizona February 23, 1943. The

Petition for Rehearing was denied April 19, 1943, upon which date the judgment, or decree, became final.

The Abstract of Record in this case, in the Answer of the appellants, pages 30 to 36, inclusive, and the Continuation of the Answer, pages 50 to 96, inclusive, with a strict verification, are replete with instances showing wherein appellants' rights under the State Constitution, and under the Constitution of the United States, have been violated and set at naught. Especial attention is called to Page 90 whereon twelve instances of derogation have been set forth in detail.

The Reporter's Transcript and the Minute Order of February 19, 1942, of the Trial of the Case, page 97 of the Abstract of Record, and the Filed Exhibits, one, and all, have an utter lack of any Assessment ever having been made on the land at issue; likewise there is no Treasurer's Deed to the Grantor of Appellee Gust, either filed as an exhibit or read into the Reporter's Transcript. A Treasurer's Delinquent Tax Deed is the main foundation of appellants' rights under the Federal Constitution.

Statement of Matter Involved.

Respondent J. L. Gust filed complaint to Quiet Title to Petitioners' realty, worth about $100,000.00, August 18, 1941, shortly after Chapter 54 went into effect which permitted him to Quiet Title against the State, County, and City, without first paying the taxes due them.

Respondent's title depends entirely upon the operation and construction of the taxation laws of Arizona he having admitted, on the witness stand, that he took his claim to the land in payment of a $1,500.00 attorney's fee from his client, Claude C. Dye. The evidence and exhibits show that Respondent Gust had full knowledge of all matters connected with the purported tax sale, and as such attorney, had signed the receipt for the money paid out for the taxes

and realized from the sale of the property with which it had been connected in the tax paying.

Ever since 1913 Arizona has had a Statute—Section 73-841, Supra, requiring all persons who contest the validity of taxes to pre-pay the taxes before they shall be permitted by any court to contest their validity. No repeal of this Statute has ever been effected.

In 1941, just previous to the filing of this action, the Arizona Legislature enacted the Chapter 54, *supra,* which permits the bringing of Quiet Title actions EVEN AGAINST THE STATE as well as against others, but in such actions against the State the statute says nothing about the pre-payment of taxes by plaintiffs who question the validity of taxes and asking that the State, County, and City be barred from claiming their respective tax liens as charges against the property. Respondent, appellee, brought this action under above statute. Appellee did not pre-pay such taxes before being permitted by the State court to question them.

If Appellant Mosher, the fee simple owner of the land, had at any time sought to question any of these taxes SHE would have been compelled under Section 73-841, *supra,* to prepay all of these taxes before being permitted to do so. This was the law governing all stages of the tax proceedings whereby she purportedly lost title up to June 19, 1941, when Chapter 54, *supra,* became effective.

See page 52, of the Abstract of Record, Paragraph VIII, Factual Statement, showing the threats of raising her assessments to an amount prohibitive of payment unless she deeded all of her realty to a corporation for a minority of its stock. Pages 55 and 56 show the raising of her assessments on the land at bar from $720.00 in 1926 to $11,900.00 in 1927, the first year her taxes were ever delinquent and the further raise in her assessment to $14,170.00 in 1928, and the perpetuation of the excessive taxation until after the purported sale in 1932, and the usurious rate of interest of 15% per annum. On page 60 Mosher pleads:

"• • • unjust discrimination, and the deprivation of the owner of the land of her equal rights with others similarly situated and a taking of her land by governing powers without due process of law to her irreparable damage."

At the bottom of page 61—" • • • on a deed based on depriving the defendant Mosher of her land utterly without due process of law to her irreparable damage."

Similar pleadings occur throughout the Continuation of the Answer. Appellants have not been given an "even break" with appellee in these proceedings.

They have been denied Equal Protection of the laws with Appellee Gust. This necessarily also means that there has not been Due Process of law in the proceedings whereby appellant has been deprived of her title by the courts of Arizona. There has not been Equal Operation of the laws between the fee simple title owner, Mosher, and the other eight appellants, with Appellee Gust, as required by the Constitution of the United States and by the Constitution of the State of Arizona. Chapter 54, *supra,* violates the Constitutions of the United States and of the State of Arizona and it has been made use of to deny to appellants the Equal Protection of the law with that accorded to Respondent Gust. Chapter 54, *supra,* also violates the Constitution of the State of Arizona in that it is a special act IN SO FAR AS TAXATION MATTERS ARE INVOLVED BECAUSE as to such matters it:

> Authorizes the relinquishment of a debt, liability or obligation to the State; regulates the practice of Courts of the State; grants to an individual (a plaintiff in a Quiet Title action against the State) an exclusive privilege or immunity from prepayment of taxes prior to contesting them; and
>
> Clause 18—and cancels the collection of taxes even though under the laws of Arizona all taxes are perpetual liens until paid regardless of the limitations on enforcement of tax liens.

The State Has Failed to Enforce Its Own Constitution.

In further support of jurisdiction herein being in United States Supreme Court see:

Bennett vs. *Nichols*, 9 Ariz. 138; 80 Pac. 392;
State vs. *Spande*, 37 Minn. 322; 34 N. W. 164; 25 Corpus Juris, 912, Note 7 and cases cited;
Fayerncather vs. *Rich*, 195 U. S. 276; 49 L. Ed. 193, (aff. 118 Fed. 943) due process of law 5th Amd.
Pacific Electric R. Rd. Co. vs. *Los Angeles*, 194 U. S. 112; 24 S. Ct. 586; 48 L. Ed. 896 (14th Amend.);
Savage vs. *Jones*, 225 U. S. 501; 32 S. Ct. 715; 56 L. Ed. 1182—Contravention of Federal Constitution by a State Law.
Memphis vs. *Cumberland, etc.*, 218 U. S. 624, 31 S. Ct. 115; 54 L. Ed. 1185.

The questions involved are substantial for the following reasons:

1. The title to approximately $100,000.00 worth of realty is involved.

2. Appellant Mosher has purportedly lost title to this realty sold through operation of the tax laws of Arizona. Respondent Gust has not been required to comply with the tax laws by prepaying taxes as a condition precedent to questioning such taxes; but appellants have at all times been required by those laws to prepay such taxes before they could question such taxes.

The administration of the law in Arizona courts has been unfair to appellants and Equal Protection of the laws have not been accorded to appellants with Appellee Gust as required by the Federal and State Constitutions. This Petition being for review of a State Court Judgment the appellants specify additional facts as follows:

The Constitutional questions herein mentioned were raised in the court of first instance, the Superior Court of

Maricopa County, Arizona; and in the Appellate Court, the Supreme Court of Arizona, which is the highest court in the State; as follows:

In Maricopa County Superior Court, in Answer of the City of Phoenix, Paragraph IV (Pages 17 and 18, Abstract of Record filed in State Supreme Court), the tax liens the City of Phoenix in the sum of $10,958.50 are alleged as unpaid. On pages 113 and 114, same Abstract of Record, a stipulation between Respondent Gust and the County of Maricopa shows conclusively that there were then on April 15, 1942 tax liens in favor of the State and County for the year of 1916 of $875.94; 1931 of $1,161.48; 1932 of $1,057.15; (1933-1934-1935-1936, not stated); 1937 of $206.98; 1938 of $177.65; 1939 of $230.78; 1940 of $196.11; 1941 not known. These amount to a considerable sum even with no explanation of missing years. There is absolutely nothing in the record to show any payment of taxes since the tax sale in 1931. On page 114 even these have been eradicated by a stipulation which leaves State and County taxes as follows:

$875.94—State and County for 1916. Wiped out in Judgment.
8.75—Personal property tax for 1931. Wiped out in Judgment.
5.99—Personal property tax for 1932. Wiped out in Judgment.

State and County taxes for the year of 1937 and subsequent years as alleged page 10. All taxes are with interest and penalties.

Respondent Gust has successfully tested the validity, and amount, of his taxes without paying one cent thereof. He has certainly been accorded a most excessive PROTECTION by the courts of Arizona.

See paragraph IV of appellants' answer on pages 33 and 34, Abstract of Record, that taxes were not paid. See page

65, Abstract of Record, for Federal Questions of "due process of law" and "derogation of the taxing statutes of * * * its Constitution." Please read pages 66 and 67, A. of R. barring all liens by a Tax Sale Deed. Paragraph I, page 32, A. of R. shows that the State, County, and City:

> "* * * cannot be affected by any suit to Quiet Title * * *"

Please read the brief to the Trial Court of the Deputy County Attorney, pages 101 to 104, inclusive, Abstract of Record, adopted by appellants as their own, objecting to annulment of tax liens and unconstitutionality of Chapter 54.

See Statement of Points No. 32, pages 145-6, Abstract of Record for:

> 32. "All stages of a Delinquent Tax Sale must give the Equal Protection of the law to all parties connected therewith such as is guaranteed by the Constitution of the United States, especially Amendments 5 and 14. That no governing power can deprive these citizens and appellants of their land and vested liens without due process of law."

See Page 138, Abstract of Record, Statement of Points No. 4 for:

> 4. "That no court can nullify a tax lien on land that was put there by legislative enactment."
>
> 6. "That the 1931 tax law repealed all laws in conflict with it, and while Sections 18 and 34 may appear to be contradictory that Section 34 does not nullify the liens prior to five years but merely holds them in abeyance subject to a possible remedial measure that might be contingently retroactive, enacted in the future."

See Page 139 of Abstract of Record for Statement of Point No. 15, as follows:

> 15. "As tax payers, on a parity with all other citizens of Maricopa County, and probably of the State of Arizona, these appealing defendants claim that no individual can, by the mere filing of a complaint, drag the governing taxing powers into court to thereby limit the rights of thousands of citizens. When they do elect to come into court and furnish the plaintiff with information as to his financial obligation to them it is merely courtesy and accommodation on their part. No default could be entered against the rights of tax collection for the benefit of every citizen to whom official books belong, as a vested right. The Tax Collectors are merely clerical scribes and keepers of public records."

See Page 14, Paragraph XI, of the Answer of the County Attorney alleging that the taxes are liens until they are paid or until the property is sold and title finally vests in a purchaser. Appellant Mosher being the title owner of the property she was vitally interested in seeing that the tax liens were lifted and paid—her interest extending much farther than that of a mere tax payer.

See Paragraph XII of Appellants' Continuation of Answer, Page 67, A. of R. for:

> "• • • These defendants allege that the said grantor of the plaintiff asked for, and received, the said Delinquent Tax Deed for the purpose of wiping out, and making as naught all liens against the so-called Lot 3, or any part thereof."

See page 41, Reporter's Transcript, lines 15 and 16 for stipulation as to taxes and declaration by Attorney Robinette for Appellee Gust that:

> "But I do not admit the validity or priority of these taxes."

Appellee was in substance Contesting Taxes and it was ERROR to permit him to maintain his Quiet Title Action without pre-payment of the taxes especially when appellee was asking that such taxes be forever barred. See the prayer of appellee's complaint, page 7, A. of R. and paragraphs III and IV, pages 5 and 6, A. of R. said complaint.

See page 46, Reporter's Transcript, lines 2 and 3, and 24, for Appellant Mosher's Statement regarding taxes many years previous:

"Mrs. Mosher: "It is merely that the lien is there."

Even the 5 year limitation statute on ENFORCEMENT had expired; and page 46, line 24, to the same effect:

"Mrs. Mosher: But the lien is there."

Same page 46, lines 14 to 17, inclusive, which state:

"Mr. Hardy: * * * From then on it is purely a question of law for Judge Phelps to decide as to the validity of the liens of those taxes and as to what year."

See page 43, lines 7 to 10, inclusive, Reporter's Transcript for appellee's position against validity of taxes:

"Mr. Robinette: And by admitting that the taxes appear on the books of the City Treasurer we are not conceding that the remedy for the enforcement thereof is not barred."

See page 42, lines 18 to 22, inclusive, for comment by the trial court:

"The Court: There is a statute of limitation of five years in one place and in another place it says the taxes cannot be removed except by payment and satisfaction, so there is a conflict in the law there."

And on same page, lines 13, 14 and 15:

"The Court: If the statute is constitutional it does presume to wipe everything out, doesn't it?"

And on same page, lines 23 and 24:

"Mr. Hardy: The Supreme Court has held there isn't a tax limitation statute. * * *"

The Continuation of the Answer was ordered filed by the court on page 6, lines 10 to 15, inclusive, Reporter's Transcript.

The HISTORY of the facts is that Respondent Gusts' client, Claude Dye, held a mortgage on the South Half of lot 3, Block 1. There was no mortgage to Dye on the North Half. The entire Lot 3 had been assessed together and Dye paid the taxes on the whole lot and added it to the amount due on his mortgage when Attorney Gust foreclosed it for him. When the mortgaged land was sold Attorney Gust signed a receipt for all of the taxes paid. No claim was ever made by Dye that he had a "Certificate of Purchase" on the North Half. Defendants' Exhibit 2 has a certified copy of the check given to the County Treasurer, endorsed by Dye, himself, as being FOR TAXES PAID. The courts held that land that had been assessed together could not be divided for the purpose of tax paying and that the money paid for taxes on the North Half of 3 was a proper charge on the amount of the mortgage. The "Tax Receipt" was never considered as a basis for a delinquent tax deed. On page 89, lines 12 to 16, inclusive, Gust testified that "As Mrs. Mosher says, it was the settlement of a Fee," in the Reporter's Transcript. In the same transcript what "Mrs. Mosher said" is lines 9 to 18, inclusive, page 78, and lines 1 to 14, inclusive, page 74, and lines 19 to 26, inclusive, page 74, continued in lines 1-2 and 3, page 75.

It is clearly shown by the exhibits, testimony, and Defendants' Answer, that J. L. Gust, Respondent, took whatever rights Dye had in the so-called North Half of Lot 3, Block 1, Churchill, as payment of a fee from his client, Dye, and that the Tax money, paid out for the protection of the mortgage on the South Half of the lot, was returned to Dye and Gust three (3) separate and distinct times and now Gust is trying to "GET THE LAND"; line 2, page 76, Reporter's Transcript.

Copies of the Petitions for Re-hearing and continuations thereof, filed in the Supreme Court of Arizona are filed herewith, attached hereto, and made a part hereof, they being in three separate documents; namely: The Petition; The Continued Petition; and Appellants' Additional Citations on Petition, together with many Citations of Authorities, all proving the Federal Questions claimed for the United States Court.

All matters mentioned herein were duly presented to the Supreme Court of Arizona in the three documents filed for the purpose of securing a Hearing in that court, which had denied to eight (8) appellants their Constitutional Right of Appeal, and had affirmed the Judgment of the Superior Court of Maricopa County, Arizona, as to giving to Respondent Gust the land of which Mrs. Mosher was the Fee Simple Owner after she had paid the tax money back three (3) separate times with 15% interest thereon.

The Federal Questions here involved were raised by these Petitioners (Defendants and Appellants) continuously, and persistently, from their first appearance in this action, down to, and including, the filing of this document.

Conclusion.

The administration of the Judicial and Legislative branches of the Government of the State of Arizona has denied Equal Protection, and Equal Operation of the Law; and Due Process of Law to these Petitioners and they have thereby been deprived of title to substantial property rights and interests, all without just compensation. The statute under which the Quiet Title Action was brought and maintained is violative of the Federal and State Constitutions and should be declared void and the said Judgment of the Superior Court and Affirmance by the Supreme Court of Arizona, the highest court in the State, should be reversed.

Respectfully submitted by: Platt, Henderson, Warner & Cram, by Wilber Henderson, 1115 Porter Building, Portland, Oregon; Harry J. Valentine, local associate attorney.

THOMAS OWEN MARLAR,
Attorneys for the Petitioners.

Address: 313 North Center Street,
Phoenix, Arizona.

HARRY J. VALENTINE,
Of Counsel.

REPLY

BRIEF

SEP 27 1943
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 308

COIT I. HUGHES; H. B. HUGHES; J. M. GOODSON; ET AL.,

Appellants,

vs.

J. L. GUST.

ON APPEAL FROM THE SUPREME COURT OF ARIZONA.

APPELLANTS' REPLY TO MOTION TO DISMISS.

THOMAS OWEN MARLAR,
Counsel for Appellants.

WILBER HENDERSON,
HARRY J. VALENTINE,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 308

COIT I. HUGHES; H. B. HUGHES; J. M. GOODSON; FRANCES LOUNT; S. D. LOUNT; J. D. COLLINS; J. W. RAY; JULIA C. COLLINS; H. L. MOSHER, INDIVIDUALLY, AND H. L. MOSHER, AS TRUSTEE,

Appellants,

vs.

J. L. GUST.

APPELLANTS' REPLY TO RESPONDENT'S MOTIONS IN OPPOSITION TO JURISDICTION AND FOR A DISMISSAL.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States.

Come now the above appellants and oppose the Motions filed by the respondent in the Supreme Court of the State of Arizona, and respectfully submit that:

A public official cannot waive a duty imposed upon him by law. The Treasurer and Tax Collector of the State of Arizona, and its agent the County of Maricopa, and of the City of Phoenix, could not waive any rights imposed upon them under the Statutes. The fact that neither the State,

County, nor City appealed did not affect the rights of these petitioners. These officials were merely agents of these tax paying petitioners. These petitioners had a vested right to "Carry On" when their underlings failed in their duties to the taxpayers of the State, County and City. It follows, also, that if the State, County and City waived their rights, or compromised, it could not affect the interests of these petitioners whose interests are separate and distinct. It should be noted that any, and all, compromises and settlements, if any there were, have been made after the original decision in the lower court, affirmed by the State Supreme Court.

The petitioners oppose the motions of the respondent to dismiss and his claim that this tribunal has no jurisdiction as the last paragraph of his statement is as follows:

> "No Constitutional question is suggested in the petition for allowance of appeal to the Supreme Court of the United States except the fact that the respondent has not been compelled to pay taxes by reason of the failure of the County and City to appeal, which he ought to be required to pay. This, of course, is not depriving the petitioners of property without due process (of law) or denying to them the equal protection of the law."

Memorandum of Authorities and Discussion of Motion.

This motion is in the nature of a Motion for Judgment on the Pleadings. The language used in the paragraph set forth in the motion and taken from the respondent's statement on jurisdiction is a very clear admission that respondent ought to be required to pay the taxes he sought to, and did, wipe out in the judgment quieting title.

The failure of the state courts to require the payment of the taxes was a denial of equal protection of the law to petitioners because if these petitioners had sought, or desired at any time, to wipe out these taxes without paying them

they would have been compelled to pre-pay them before they would have had any standing in court at all. But the respondent was permitted all the way through this litigation to contest the validity of these taxes without paying them and against the wishes of petitioners.

It was by and through the operation of the tax laws that petitioner H. L. Mosher has been divested of her fee simple title, and the other petitioners have been divested of their rights, liens, and other claims upon the realty involved. These same tax laws required the prepayment of the taxes by the respondent before he could ask any court to wipe them out without pre-paying them. Over his own signature as an attorney for himself the respondent admits that the taxes should have been paid, by him, but his excuse for not paying them is that

"the City and County did not appeal."

The failure of the County and City to appeal could not rob petitioners of their right to a substantial compliance with the Tax Laws, the very laws through which Mosher has, so far, lost title, and neither could the State, County, nor City, lose their rights by the failure of their employees, or servants, to perform their duties.

See:

Fishback v. *Globe Co.*, 82 Wash. 124, 143 Pac. 848;
Dept. Ins. v. *Church Members, etc.*, 217 Ind. 58, 26 N. E. 2nd 51-52; 128 A. L. R. 635;
Mullen v. *State*, 114 Cal. 578-587, 46 Pac. 670, 34 L. R. A. 262;
Sanitary Dist. v. *United States*, 266 U. S. 405, 45 Sup. Ct. 176;

See:

Maricopa County v. *Trustee Lodge*, 52 Ariz. 329, at 336, 80 Pac. 2nd 955,

holding a tax is not a debt and the taxing power is held to be inherent and taxes non-cancellable by the commission, or

omission, of public officers in all cases including (and taxes are not debts):

19 American Jurisprudence, page 18, Sec. 166, Note 7;
26 R. C. L. page 26, Sec. 12, "Taxation";
Key No. Pac. Digest, 62 (2), "Estoppel";
Caminetti v. *Insurance Co. Calif.*, 126 Pac. 2nd 165, at 168.

"Power of taxation is inherent and acts of public officers cannot waive nor destroy the rights of the state on tax matters":

Lewis v. *Leon County*, 91 Fla. 118, 107 So. 146;
Davis v. *McLean County*, 53 N. D. 857, 204 N. W. 459;
Long v. Watts, 183 N. C. 99, 110 S. E. 765, 22 A. L. R. 277;
Cleveland v. *Edwards*, 109 Ohio State, 598, 143 N. E. 181, 37 A. L. R. 1352.

"Any taxpayer can intervene in some jurisdictions":

See:

59 C. J. 279, Sec. 425; *Christmas* v. *Warfield*, 66 Atl. 491, 105 Md. 530.

In states where a contrary rule prevails if the taxpayer has a

Special Interest

in the property he can intervene on behalf of the state:

See:

Warner v. *Carlisle*, 144 N. Y. S. 70, 158 App. Div. 638, and even the smallness of the taxpayer's direct interest is immaterial.

See:

Ellington v. *Dye*, 99 N. E. 1, 178 Ind. 336, Ann. Cases 1915 C. 200.

While the interest of H. L. Mosher in a property admittedly worth over $100,000.00 can hardly be called a "Small Interest" it certainly is the "Special Interest" required in some jurisdictions, while the interest of Respondent Gust is merely that of a lawyer trying to collect a $1,500.00 attorney's fee, as admitted by him on Lines 14 and 15, Page 89, Reporter's Transcript. In other words, Gust got a fee title ownership in $100,000.00 worth of realty for a small attorney's fee of $1,500.00, while Mrs. Mosher, stood helplessly by, in the position of:

> "Every land owner who is forced to stand by and helplessly watch the tidal wave of greater wealth which is not only able to hold its own possessions but to absorb the possessions of those less fortunately situated, sweeping the very land from under his feet, is entitled to the closest scrutiny of every official act by which he is losing the savings of the best years of his life."

Federal Questions.

These petitioners respectfully call the attention of this High Tribunal that at the first inception of their appearance in this action in their Answer to the suit to quiet title, that among many Federal Questions raised by them, are found in the printed Abstract of Record:

At Page 60:

> "These defendants allege that the arbitrary assessments from 1927 to 1932, inclusive, a period of six years, and the sale of the land for delinquent taxes, was an arbitrary and unjust discrimination, and the deprivation of the owner of the land of her equal rights with others similarly situated and a taking of her land by governing powers without due process of law to her irreparable damage."

At Page 61:

"* * * depriving the defendant Mosher of her land utterly without due process of law to her irreparable damage."

At Page 65:

"* * * is unconstitutional and in derogation of the taxing statutes of the State of Arizona and of its Constitution."

At Page 68:

"* * * rendered all matters in connection therewith null and void not being due process of law."

Same page 68:

"* * * deprived these defendants of their equal rights with those of others similarly situated, and took their property from them by the governing powers without due process of law and has damaged them in enormous sums and rendered the profitable use of their property, by them an impossibility."

At Page 69:

"* * * is to deprive these defendants of their constitutional right of equal protection."

At Page 76:

"* * * either Section 25, of Chapter 103, of the Session Laws of 1931, is unconstitutional or that the State law * * * is unconstitutional. * * * As a further discrimination * * *".

At Page 88:

"* * * deprives these defendants of their land without due process of law, or any process of law and is in violation of the rights of these defendants as guaranteed to them under the Constitution of the United States, and particularly under amendments five and fourteen thereof, which they now especially plead for their protection against the wrongs, and threatened wrongs * * * injury and damage to these defendants to an irreparable extent."

It is set forth in quotation, supra, that the defendants rely on amendments five and fourteen of the Constitution of the United States for their protection.

At Page 14, the County says, in reference to the law that Gust brought his suit to Quiet Title under without paying his taxes, that Chapter 54, amending article 14, Chapter 27, Arizona Code of 1939, (Which is fully set forth on page 12) is unconstitutional and void.

In reply to the contention of Respondent Gust regarding the lack of a description of the Exhibits filed at the Trial in the lower court it will be noted that he filed the entire files in two lengthy foreclosure suits of mortgages. See page 55 of the Reporter's Transcript. On Page 56, same, Mrs. Mosher makes an attempt to learn what documents, therefrom, Gust intends to use but the Court rules the entire records are admitted to which ruling Mrs. Mosher objects. On page 153 of the Abstract of Record Appellee (Respondent) Gust in designating the papers he wants sent to the State Supreme Court on appeal *divides* his Exhibit B, and selects therefrom three papers, a, b, and c. He also *divides* his Exhibit C, and selects therefrom six papers, a, b, c, d, e, and f. It will be noticed that on Page 169 of the A. of R. that the presiding judge signed an order that all original papers, pleadings and exhibits be sent to the Supreme Court. On page 170, same, it will be noted that the judge entered a Minute Order to the same effect. Therefore it was impossible for these appellants (petitioners) to know whether in following the usual custom of describing the various exhibits "Sent Up" they should follow the law which does not permit the *division* of an Exhibit once filed and describe every document filed in the enormous redundancy of these two foreclosures of mortgages which would have been an impossible tax in the time allotted for preparing an abstract, or whether to describe the Extracts

from an Exhibit, in two cases, and thus become a legal accessory after the fact. No attempt was made to take advantage of this illegality of *dividing a filed exhibit* but the appellants (petitioners), finding themselves between Scylla and Charybdis left the decision to appellee Gust, who under Rule IV, paragraph 4, of the Rules of the Supreme Court of the State of Arizona, could have filed "such supplemental abstract as he may have deemed necessary" at the expense of the appellants. Thus his attempt to procure dismissal from the Supreme Court of the United States for an illegality of his own in *dividing an exhibit* long after the Trial is without merit.

In conclusion it is respectfully submitted that the foregoing clearly shows that the respondent's Motion to Dismiss should be denied.

THOMAS OWEN MARLAR,
Attorney for Appellants.

WILBER HENDERSON, and
HARRY J. VALENTINE,
Of Counsel.

By THOMAS OWEN MARLAR,
Address, 313 North Center Street,
Phoenix, Arizona.